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12 UNITED STATES DISTRICT COURT  
13 WESTERN DISTRICT OF WASHINGTON

14 LACEY CARROLL,

15 Plaintiff,

16 v.

17 DAVID SETH KOTKIN, AKA  
18 DAVID COPPERFIELD,

19 Defendant.

No.: C09-1076JCC

PLAINTIFF'S MOTION TO LIFT STAY  
ORDER AND TO DIRECT CERTAIN  
FEDERAL AGENCIES TO RETAIN  
CUSTODY AND CONTROL OF  
MATERIALS OBTAINED IN  
INVESTIGATION

Noting Date: January 29, 2010

ORAL ARGUMENT REQUESTED

20 Plaintiff Lacey Carroll moves for an order lifting the stay of discovery in this matter.  
21 An immediate lift of the stay is necessary to allow Plaintiff to obtain certain discovery from  
22 the U.S. Attorney for the Western District of Washington and the Department of Justice  
23 (FBI). In addition, Plaintiff moves for an order directing the U.S. Attorney and the DOJ to  
24 retain possession and control over documents and tangible items seized and collected in  
25 connection with the criminal investigation of the Defendant, and to not return these items  
26 until the Court so orders. As explained in the memorandum below, Plaintiff is entitled to  
production for inspection and copying of a variety of materials collected by the government  
during its investigation. Now that the government has filed notice that the criminal

PLAINTIFF'S MOTION TO LIFT STAY ORDER  
AND TO DIRECT CERTAIN FEDERAL AGENCIES  
TO RETAIN CUSTODY AND CONTROL OF  
MATERIALS OBTAINED IN INVESTIGATION - 1

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1 investigation is closed, Plaintiff requests that these materials remain in the custody of the  
2 U.S. Attorney for the Western District of Washington so that it may respond to Plaintiff's  
3 discovery request and to subpoenas duces tecum the Plaintiff intends to issue when the stay is  
4 lifted. Maintaining these materials here until Plaintiff's discovery requests are met will  
5 streamline the discovery process and eliminate the risk that, upon return to the Defendant or  
6 third parties, the materials will be removed to diverse locations around the country or to the  
7 Defendant's residence in the Bahamas. Allowing the fruits of the investigation be returned  
8 prior to Plaintiff having the opportunity to inspect and copy discoverable items will only  
9 prolong the duration and increase the expense of the discovery process.

## 10 **I. INTRODUCTION**

11 The FBI and the U.S. Attorney for the Western District of Washington have been  
12 engaged in a criminal investigation of Defendant David Copperfield for approximately two  
13 years. That investigation was formally closed on January 12, 2010 and Plaintiff anticipates  
14 that the Defendant and others will seek return of documents and tangible things seized from  
15 him during the investigation. *See* Fed. R. Crim. P. 41(g). In order to minimize burdens on  
16 the parties and to ensure access to these items in discovery, Plaintiff requests that the Court  
17 enter an order that (a) lifts the stay so that the Plaintiff may serve subpoenas duces tecum on  
18 the government agencies that currently possess these documents and tangible items, and (b)  
19 directs that the government retain possession of these documents and tangible items pending  
20 either inspection and copying by the plaintiff or some other action by the Court.

21 The purpose of this motion is to preserve the status quo with respect to the materials  
22 the government has seized in its investigation. Without action by the Court, these materials  
23 may be returned to the Defendant and others from whom they were seized or collected. Mr.  
24 Copperfield owns a private island residence in the Bahamas, outside the United States. If  
25 items that the government has seized from the Defendant are returned to him and he removes  
26 them to his island home, these items will be more difficult to gain access to in discovery.

1 Items seized from third parties, such as the MGM Grand Hotel, may, upon return to those  
2 parties, be very difficult to identify. The Plaintiff seeks to avoid the risk that any documents  
3 or things collected by the government might be lost, inadvertently destroyed, or moved to  
4 locations that are expensive and burdensome to access. This is consistent with the mandate  
5 of Fed. R. Civ. P. 1, which provides that the Rules of Civil Procedure "should be construed  
6 and administered to secure the just, speedy, and inexpensive determination of every action  
7 and proceeding." Directing the federal agencies involved to retain the fruits of their  
8 investigation will greatly reduce the expense and time involved in discovery, while imposing  
9 no additional burdens on other parties.

## 10 **II. BACKGROUND**

### 11 **A. Factual Background**

12 In August, 2007 plaintiff Lacey Carroll traveled by invitation to a Caribbean island  
13 owned and occupied by David Copperfield. During Ms. Carroll's short stay, the Defendant  
14 sexually assaulted and raped her. Upon her return to the United States, Ms. Carroll  
15 immediately contacted appropriate law enforcement agencies and reported the crime. For  
16 approximately the past two years, the FBI and the U.S. Attorney for the Western District of  
17 Washington have conducted a criminal investigation of Mr. Copperfield and presented  
18 evidence to the Grand Jury. This investigation has concluded and the U.S. Attorney has  
19 declined to charge Mr. Copperfield in connection with the sexual assault on Ms. Carroll.<sup>1</sup>  
20  
21

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22 <sup>1</sup> The decision whether to prosecute or to decline prosecution for a federal offense is committed to the discretion  
23 of the United States Attorney, and as explained in the U.S. Attorney's Manual, there are sound policy reasons  
24 to decline prosecution even if there is sufficient admissible evidence to obtain a conviction: "When a person  
25 has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. This  
26 does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to  
the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity,  
Congress and state legislatures have provided civil and administrative remedies for many types of conduct  
that may also be subject to criminal sanction." *U.S. Dep't of Justice, U.S. Attorneys' Manual* § 9-27.250(B)  
(1997).

1 During the course of the criminal investigation, the U.S. Attorney's Office and the  
2 FBI collected and seized evidence from various locations and entities. For example, on  
3 October 17, 2007, FBI agents executed search warrants at Mr. Copperfield's Las Vegas  
4 residence and a warehouse he owns, and also at the Hollywood Theatre at the MGM Grand  
5 Hotel in Las Vegas. *See Declaration of Angelo Calfo in Support of Motion for Temporary*  
6 *Stay*, Dkt. No. 12-2, ¶ 3 (Oct. 5, 2009). The agents seized thousands of documents,  
7 computers, and other evidence. *Id.*; *see also Affidavit of Michael Lang*, Dkt. No. 12-3 ¶ 3  
8 (October 5, 2009). The government also interviewed witnesses and collected documents via  
9 subpoena. *Affidavit of Michael Lang*, ¶ 3. The investigation began in the summer of 2007,  
10 and according to Mr. Lang, the FBI was still busy reviewing the seized evidence in  
11 December, 2008, when he prepared his declaration. *Id.*, ¶ 4. The items seized and otherwise  
12 gathered by the FBI were collected solely in connection with the investigation of Ms.  
13 Carroll's sexual assault complaint, and are directly relevant to the allegations of this lawsuit.

#### 14 **B. Procedural History**

15 Plaintiff's complaint was filed on July 29, 2009. On August 6, 2009, the Court issued  
16 an Order Regarding Discovery and Depositions. Dkt. No. 3. Following a stipulation of the  
17 parties, the Court issued an Order extending the time for Defendant to answer the complaint.  
18 Dkt. Nos. 9 & 11. Defendant also filed a motion to stay discovery, which Plaintiff did not  
19 oppose. The Court entered an order imposing a stay and setting a status conference on  
20 March 23, 2010. *Stay Order* (Oct. 23, 2009). On Tuesday, January 12, the U.S. Attorney  
21 announced that the investigation has been closed and no longer supports a stay. *Notice of*  
22 *Conclusion Relating to Civil Case*, Dkt. 22 (Jan. 12, 2010).

#### 23 **III. THE STAY SHOULD BE LIFTED**

24 Plaintiff moves to lift the stay in this matter immediately so that she may seek certain  
25 discovery from the U.S. Attorney and FBI. Copies of the Plaintiff's discovery request is  
26

1 attached as Exhibits A to the accompanying *Declaration of Amanda Lee*. Plaintiff neither  
2 requests nor anticipates *production* of the material sought until the Court lifts the stay of  
3 discovery and, if necessary, rules on any motions related to the discovery requests. The  
4 purpose for an immediate lift of the stay is to preserve plaintiff's *ability* to obtain access to  
5 materials in the government's possession and to protect the Court's ability to review the  
6 materials *in camera* if necessary or to rule on motions, if any are filed, objecting to disclosure  
7 of the materials..

8 In the absence of a release from the stay to serve these requests, there is a risk that the  
9 government will return these items to the Defendant and third parties, and that they will be  
10 damaged, lost, inadvertently destroyed, or removed to a location that makes production more  
11 difficult to obtain. Fed. R. Crim. P. 41(g) provides that a person "aggrieved ... by the  
12 deprivation of property" may seek its return. Once the government has declined to file  
13 criminal charges, a Defendant may seek return of property seized in the investigation, and,  
14 with several exceptions, the Defendant is entitled to return of the property. The same is true  
15 for third parties from whom property was seized. A motion for return of property is filed and  
16 heard in the district in which the property was seized – in this case, the District of Nevada.

17 Although Mr. Copperfield and third parties may ultimately be entitled to the return of  
18 property that was seized, it is critical that the Court presently preserve its ability to exercise  
19 its authority over discovery matters, and to ensure that discovery proceeds in a manner  
20 consistent with the overarching requirements that discovery be speedy and inexpensive. That  
21 authority may be limited, compromised, or lost entirely if property is returned to the  
22 Defendant and then removed to his private Caribbean island home, or returned to third  
23 parties. Even the reintegration of documents into a large hotel's databases may render  
24 discovery much more expensive and less effective. To avoid these risks, we request, as  
25 detailed below, an order directing the U.S. Attorney and the DOJ to maintain custody of the  
26 grand jury materials, including property seized from the Defendant. To secure Plaintiff's

1 ability to access these materials in discovery, the Court should issue an order lifting the of  
2 stay of discovery so that the Plaintiff may serve appropriate subpoenas on the federal  
3 agencies in possession of the property.

#### 4 **IV. THE GOVERNMENT SHOULD BE ORDERED TO RETAIN SEIZED** 5 **PROPERTY**

6 After the stay has been lifted in this matter, Plaintiff intends to serve subpoenas duces  
7 tecum on the U.S. Attorney for the Western District of Washington and on the DOJ, as the  
8 agency in control of material in the possession of the FBI. As explained below, an order  
9 from the Court directing the federal agencies to maintain possession of the materials is  
10 appropriate. The materials are, in all likelihood, non-privileged and discoverable. Obtaining  
11 access to them while they are here in the Western District will keep the expense of discovery  
12 down and streamline the process. To the extent any party with an interest in the seized items  
13 has an objection to discovery, the Court may rule on motions for appropriate protective  
14 orders.

##### 15 **A. Court's Authority to Order Production**

16 The DOJ and U.S. Attorney are properly subject to requests for production and  
17 subpoenas duces tecum directed at material gathered in the course of their investigatory  
18 work. Behind every discovery request in a civil action lies the fundamental principle that  
19 "the public ... has a right to every man's evidence." *Exxon Shipping Co. v. U.S. Dep't of*  
20 *Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (quoting *United States v. Bryan*, 339 U.S. 323, 331  
21 (1950) & Wigmore, Evidence § 2192 (3d. ed.)). Federal agencies, acting pursuant to 5  
22 U.S.C. § 301 (the "housekeeping" statute), routinely issue regulations delineating procedures  
23 to which they adhere when responding to discovery requests and demands. The Department  
24 of Justice's housekeeping regulations are codified at Title 28, Part 16 of the Code of Federal  
25 Regulations. *See* 28 C.F. R. §§ 16.21-16.28. Section 16.21 provides that the regulations are

26 to be followed with respect to the production or disclosure of any material contained  
in the files of the Department ... in all federal and state proceedings in which the

1 United States is not a party, ... when a subpoena, order, or other demand (hereinafter  
2 collectively referred to as a "demand") of a court or other authority is issued for such  
material or information.

3 28 C.F. R. § 16.21(a). The regulations further provide that in a federal case in which the  
4 United States is not a party, employees of the Department are prohibited from producing or  
5 disclosing material acquired as part of their job performance without prior approval of the  
6 appropriate Department official in accordance with the regulations. 28 C.F.R § 16.22(a).  
7 Further sections of Title 18, Part 16 set forth procedures and criteria to be applied by the  
8 responsible agency official in determining whether to provide the material requested.

9 A request for production made by a party in a case in which the U.S. is not a party is  
10 generally referred to as a "*Touhy*" request, based on the Supreme Court decision in *United*  
11 *States v. Touhy*, 340 U.S. 462 (1951). There, the Supreme Court held that an FBI agent may  
12 not be held in contempt for refusing to respond to a subpoena duces tecum for documents  
13 sought by an inmate in connection with a habeas corpus proceeding. *Id.* at 463-64. *Touhy*  
14 upheld the validity of housekeeping regulations enacted by federal agencies insofar as they  
15 centralize the agency's process for determining whether to comply with, or resist, a  
16 subpoena. *Id.* at 468. The *Touhy* Court did not, however, reach the issue of an agency  
17 head's power to refuse to produce documents or testimony pursuant to a valid request or  
18 subpoena. *Id.* at 467 ("We find it unnecessary, however, to consider the ultimate reach of the  
19 authority of the Attorney General to refuse to produce at a court's order the government  
20 papers in his possession ..."). Thus, *Touhy* recognizes that agencies may regulate their  
21 officers and employees, but it does hold that agency regulations create any privilege to avoid  
22 disclosure pursuant to a valid request or subpoena.

23 Following *Touhy*, both the housekeeping statute and the DOJ regulations were  
24 amended to indicate expressly that neither § 301 nor regulations promulgated pursuant to  
25 § 301 authorize withholding information from the public or limiting its availability. The  
26 DOJ regulations now provide that

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1 [t]his subpart is intended only to provide guidance for the internal operations of the  
2 Department of Justice, and is not intended to, and does not, and may not be relied  
upon to create any right or benefit, substantive or procedural, enforceable at law by a  
party against the United States.

3 28 C.F.R § 16.21(d).

4  
5 The issue left unresolved in *Touhy* was reached by the Ninth Circuit in *Exxon*  
6 *Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994). There, the Ninth Circuit  
7 held that the housekeeping statute “does not, by its own force, authorize federal agency heads  
8 to withhold evidence sought under a valid federal court subpoena.” *Exxon*, 34 F.3d at 777.  
9 *See also, Watts v. Securities and Exchange Comm'n*, 482 F.3d 501, 509 (D.C. Cir. 2007)  
10 (noting that while “an agency regulation may provide the method by which an agency head  
11 will comply with or oppose a subpoena, the legal basis for any opposition to the subpoena  
12 must derive from an independent source of law such as a governmental privilege or the rules  
13 of evidence or procedure” (quoting 9 James Wm. Moore et al., *Moore's Federal Practice &*  
14 *Procedure* § 45.05[1][b] (3d ed. 2006))). The *Exxon* case involved attempts by Exxon  
15 Shipping Co. in the *Valdez* litigation to obtain discovery from several federal agencies. The  
16 court explained that neither the text of the statute, its history, nor any Supreme Court case  
17 supported the proposition that agency heads could withhold documents or testimony from  
18 federal courts. *Id.* at 778. Further, the court rejected the argument that the government's  
19 decisions whether to produce or not were protected by sovereign immunity. Rather, the court  
20 said, “judicial control over the evidence in a case cannot be abdicated to the caprice of  
21 executive officers.” *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953)). The  
22 court concluded that federal courts could, by applying the Rules of Civil Procedure,  
23 adequately protect the government's interests in conserving its resources in cases in which it  
24 is not a party. *Id.* at 779.

25 As recognized in *Exxon*, to obtain access to documents held by a government agency,  
26 a party may proceed by Rule 45 subpoena or by a *Touhy* request, or both. In either case, the



1 government analyzes the request pursuant to its regulations. If the agency's decision is  
2 adverse to the party seeking production, that party may bring the matter to the court by a  
3 motion pursuant to Rule 26. *Exxon*, 34 F.3d 780 and n.11 (explaining that recourse to an  
4 action under the Administrative Procedures Act, the preferred approach in some circuits, is  
5 "costly, time-consuming, inconvenient to litigants, and may effectively eviscerate any right  
6 to the requested testimony" (internal quotations and citations omitted)). As explained by the  
7 *Exxon* court,

8 district courts should apply the federal rules of discovery when deciding on discovery  
9 requests made against government agencies, whether or not the United States is a  
10 party to the underlying action. Under the balancing test authorized by the rules, courts  
can ensure that the unique interests of the government are adequately considered.

11 *Id.* at 780.

12 Plaintiff in this matter has prepared and submitted appropriate *Touhy* requests to the  
13 U.S. Attorney and Department of Justice and has endeavored to comply with DOJ's  
14 procedural regulations. *See Declaration of Amanda Lee* and attached exhibit. In the event  
15 the agencies object to any portion of our requests, it is this Court which should analyze the  
16 issues of relevance and privilege.

### 17 **B. Plaintiff's Right to Discovery of Grand Jury Materials**

18 While it is premature to assert that Plaintiff's *Touhy* requests and subpoenas duces  
19 tecum will not encompass any privileged or secret matters, it should be clear that there is no  
20 general rule of secrecy that limits or prohibits disclosure of the materials Plaintiff seeks.  
21 The Grand Jury secrecy rule, Fed. R. Crim. P. 6(e)(2), prohibits disclosure of "a matter  
22 occurring before the grand jury." As explained by the D.C. Circuit in *Securities and*  
23 *Exchange Comm'n v. Dresser Industries*, 628 F.2d 1368 (D.C. Cir. 1980), the Rule "serves to  
24 protect the identities of witnesses or jurors, the substance of testimony, the strategy or  
25 direction of the investigation, the deliberations or questions of jurors, and the like." *SEC v.*  
26

1 *Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C.Cir.) (*en banc*), *cert. denied*, 449 U.S.  
2 993 (1980).

3 The rationales for the general principle of grand jury secrecy are set forth in *Douglas*  
4 *Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, (1979):

5 (1) To prevent the escape of those whose indictment may be contemplated; (2) to  
6 insure the utmost freedom to the grand jury in its deliberations, and to prevent  
7 persons subject to indictment or their friends from importuning the grand jurors; (3)  
8 to prevent subornation of perjury or tampering with the witness who may testify  
9 before (the) grand jury and later appear at the trial of those indicted by it; (4) to  
10 encourage free and untrammelled disclosures by persons who have information with  
respect to the commission of crimes; (5) to protect innocent accused who is  
exonerated from disclosure of the fact that he has been under investigation, and  
from the expense of standing trial where there was no probability of guilt.

11 *Douglas Oil Co.*, 441 U.S. 211, 219 n.10 (1979) (internal citations and quotations omitted).

12 In light of the underlying rationale, courts have held that Rule 6(e) must not be read so  
13 literally as to draw “a veil of secrecy ... over all matters occurring in the world that happen to  
14 be investigated by a grand jury.” *Dresser*, 628 F.2d at 1382. *See also Senate of the*  
15 *Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987)  
16 (holding that “there is no *per se* rule against disclosure of any and all information which has  
17 reached the grand jury chambers. ... [T]he touchstone is whether disclosure would tend to  
18 reveal some secret aspect of the grand jury's investigation[,] such matters as the identities of  
19 witnesses or jurors, the substance of testimony, the strategy or direction of the investigation,  
20 the deliberations or questions of jurors, and the like. The disclosure of information  
21 coincidentally before the grand jury [which can] be revealed in such a manner that its  
22 revelation would not elucidate the inner workings of the grand jury is not prohibited.”)  
23 (internal citations, quotations and footnotes omitted)).

24 There is no principled reason to presume that Plaintiff’s *Touhy* requests and  
25 subpoenas will encompass material that would disclose the inner workings of the grand jury  
26 or its deliberations. Plaintiff’s *Touhy* request and subpoena are not limited to documents or

1 things that were actually shown to the grand jury; rather, Plaintiff requests access to any  
2 documents and tangible items that are relevant to the issues in her complaint, regardless of  
3 whether these items were presented to the grand jury. As such, a response to the requests  
4 need not reveal whether a document or item was ever even presented to the Grand Jury. Nor  
5 do the requests seek production of any materials related to the grand jury's deliberations or  
6 inner workings. Therefore, the material is likely discoverable.

### 7 **C. Potential for Loss, Damage, Destruction, or Removal of Materials**

8 As noted above, in light of the government's announcement that it has closed its  
9 investigation, the Defendant and others may move, pursuant to Fed. R. Crim. P. 41(g), for  
10 return of property seized during the search. With respect to Mr. Copperfield in particular,  
11 there is cause for concern that if documents and tangible things are returned, they could be  
12 relocated to his private island residence in the Bahamas. While this does not prevent  
13 discovery of documents and tangible things necessarily, it could certainly add to the cost and  
14 logistical difficulty of obtaining production. The Defendant or third parties, such as the  
15 MGM Grand Hotel, might reintegrate electronic and paper documents into files and  
16 databases from which they were removed, and discovery of those materials could be very  
17 expensive and time-consuming. More worrisome, a party who regains custody of materials  
18 that were seized in 2007 may inappropriately damage or destroy materials that Plaintiff  
19 intends to seek in production.

20 Rule 1 imposes an affirmative duty on the district courts to "exercise the authority  
21 conferred by these rules to ensure that civil litigation is resolved not only fairly, but also  
22 without undue cost or delay." Fed. R. Civ. P. 1, Advisory Committee Notes, 1993  
23 Amendment. The relief requested by the Plaintiff fundamentally serves these interests. The  
24 Defendant or third parties may have objections to the disclosure of certain documents or  
25 things. Those can readily be resolved by this Court on appropriate motions for protective  
26 orders. Leaving the materials where they are at present, however, will streamline the process

1 of obtaining discovery and resolving objections to disclosure. The burden and expense on all  
2 parties will be reduced.

3 **V. CONCLUSION**

4 For all of the above reasons, Plaintiff's motion for an order (a) lifting the stay of  
5 discovery, and (b) directing the U.S. Attorney for the Western District of Washington and  
6 DOJ to retain custody of materials seized and collected in the investigation of the Defendant  
7 should be granted. A proposed order is included with this motion.

8  
9 RESPECTFULLY SUBMITTED this 13th day of January, 2010.

10 SCHROETER, GOLDMARK & BENDER

11 s/Rebecca J. Roe

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## CERTIFICATE OF SERVICE

I hereby certify that on January 131, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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